CHANDRASEKARAN THANGAVELU & ANOR

v.

AL ANNAMALAI & ANOR

COURT OF APPEAL, KUALA LUMPUR
ARIFIN ZAKARIA JCA
HASHIM YUSOFF JCA
AZMEL MAAMOR J
[CIVIL APPEAL NO: M-02-465-1999]
14 MAY 2004

FAMILY LAW: *Children - Adoption - Adoption order - Made by High Court under s. 3 Adoption Act 1952 - Whether such adoption order appealable - Whether there is statutory right of appeal to Court of Appeal or Federal Court under s. 22 Adoption Act 1952 - Whether appeal only lies against 'refusal' of High Court to make adoption order - Whether party against whom adoption order is made is without remedy - Adoption Act 1952, 25(6) and 10(5) - General appellate jurisdiction of Court of Appeal - Courts of Judicature Act 1964, s. 67*

CIVIL PROCEDURE: *Appeal - Statutory right of appeal - Whether exists - Adoption order made by High Court under s. 3 Adoption Act 1952 - Whether such adoption order appealable - Whether there is statutory right of appeal to Court of Appeal or Federal Court under s. 22 Adoption Act 1952 - Whether appeal only lies against 'refusal' of High Court to make adoption order - Whether party against whom adoption order is made is without remedy - Adoption Act 1952, 25(6) and 10(5) - General appellate jurisdiction of Court of Appeal - Courts of Judicature Act 1964, s. 67*

Two applications had earlier been filed in the High Court with respect to a child ('J'); one by the appellants herein ('the natural parents') for a writ of *habeas corpus* to have J released into their custody, and the other by the respondents herein ('the adoptive parents') for the legal adoption of J under the Adoption Act 1952 ('the Act'). After a hearing, the learned judge found in favour of the adoptive parents and, accordingly, dismissed the natural parents' application for J to be released into their custody. Aggrieved, the natural parents appealed. At the hearing before the justices of appeal, the adoptive parents raised a preliminary objection as to the competency of the appeal, namely, that, having regard to s. 22 of the Act, an appeal lies to the Court of Appeal **only** from a **refusal** of the High Court to make an adoption order (and **not** from a decision of the High Court to grant such an order).

Held (upholding the preliminary objection)
Per Arifin Zakaria JCA delivering the judgment of the court

[1a] There was merit in the adoptive parents' preliminary objection. Section 22 of the Act specifically provides that an appeal shall lie **only** from a **refusal** of the High Court to make an adoption order. Where the High Court grants an adoption order, as it did in the instant case, there is **no** statutory right of appeal. In this regard, s. 22 of the Act has higher specificity and thus prevails over both ss. 25(6) and 10(5) of the Act. Section 25(6) of the Act deals only with consequential orders while the right of appeal under s. 10(5) of the Act relates solely to s. 10(4) of the Act. There may well be a lacuna in the Act but this falls beyond the remedial faculties of the Court of Appeal. (pp 812 c-f & 813 c, f-h)

[1b] The wide appellate jurisdiction of the Court of Appeal, as conferred by s. 67 of the Courts of Judicature Act 1964 ('the CJA'), is "subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought". The applicable written law in the instant case is s. 22 of the Act which restricts the right of appeal to cases where an application for adoption has been **refused** by the court of first instance. (p 814 c)

Obiter:

Even if there is a right of appeal (under s. 22 of the Act) from a decision of the High Court granting an adoption order, an appeal would lie only to the Federal Court and **not** to the Court of Appeal. (p 815 c)

[Appeal struck out.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Dua permohonan sebelum ini telah difailkan di Mahkamah Tinggi berkaitan dengan seorang kanak-kanak ('J'), iaitu pertama oleh perayu-perayu di sini ('ibu bapa kandung') untuk writ habeas corpus supaya J diserahkan kepada jagaan mereka, dan kedua oleh responden-responden ('ibu bapa angkat') untuk mengambil J sebagai anak angkat di bawah Akta Pengangkatan 1952 ('Akta'). Selepas pendengaran, yang arif hakim membuat dapatan yang berpihak kepada ibu bapa angkat, sekaligus menolak permohonan ibu bapa kandung supaya J diserahkan kepada jagaan mereka. Tidak berpuas hati, ibu bapa kandung merayu. Pada pendengaran di hadapan hakim-hakim rayuan, ibu bapa angkat telah membangkitkan bantahan awal terhadap kekompetenan rayuan, iaitu, bahawa, mengambil kira s. 22 Akta, rayuan hanya boleh dibuat ke Mahkamah

Rayuan terhadap keengganan Mahkamah Tinggi untuk membuat perintah pengangkatan (dan tidak terhadap keputusan Mahkamah Tinggi membenarkan perintah tersebut).

Diputuskan (membenarkan bantahan awal)
Oleh Ariffin Zakaria HMR menyampaikan penghakiman mahkamah:

[1] Terdapat merit dalam bantahan awal ibu bapa angkat. Seksyen 22 Akta secara khusus menyebut bahawa rayuan hanya boleh dibuat terhadap keengganan Mahkamah Tinggi membuat perintah pengangkatan. Di mana Mahkamah Tinggi membenarkan perintah pengangkatan, sebagaimana yang dilakukan di sini, tiada hak statutori untuk merayu. Seksyen 22 Akta juga mempunyai kekhususan yang lebih tinggi dan dengan itu mengatasai kedua-dua s. 25(6) dan 10(5) Akta. Seksyen 25(6) Akta hanya menyentuh soal perintah-perintah susulan sementara hak merayu di bawah s. 10(5) semata-mata berkaitan dengan s. 10(4) Akta. Mungkin terdapat lacuna di dalam Akta tetapi itu tidak termasuk dalam ruang litup kuasa meremedi Mahkamah Rayuan.

[2] Bidangkuasa rayuan Mahkamah Rayuan yang sebegitu luas, seperti yang diperuntukkan oleh s. 67 Akta Mahkamah Kehakiman 1964 ('AMK'), adalah "bagaimanapun tertakluk kepada undang-undang bertulis ini atau yang lain yang menyelia terma-terma dan syarat-syarat di atas mana rayuan-rayuan tersebut boleh dibuat". Dalam kes semasa, undang-undang bertulis yang terpakai adalah s. 22 Akta yang menghadkan rayuan hanya kepada kes-kes di mana permohonan untuk pengangkatan telah ditolak oleh mahkamah yang pertama.

Obiter:

Jika pun terdapat hak untuk merayu (di bawah s. 22 Akta) terhadap keputusan Mahkamah Tinggi membenarkan perintah pengangkatan, rayuan hanya boleh dibuat ke Mahkamah Persekutuan dan bukannya ke Mahkamah Rayuan.

Rayuan ditolak.]

Case(s) referred to:

Auto Dunia Sdn Bhd v. Wong Sai Fatt [1995] 3 CLJ 485 FC ***(refd)***

Benson v. Northern Ireland Road Transport Board [1942] AC 520 ***(refd)***

Capital Insurance Bhd v. Aishah Abdul Manap [2000] 4 CLJ 1 FC ***(refd)***

Re Thow Seng Yeap; Thow Chow Goon & Anor v. Khor Kar Chooi & Anor [1989] 3 MLJ 482 ***(dist)***

TPC v. ABU & Anor [1983] 1 CLJ 330; [1983] CLJ (Rep) 881 HC ***(foll)***

United Malacca Bhd v. Pentadbir Tanah Daerah Alor Gajah & Other Applications [2002] 4 CLJ 177 FC ***(foll)***

Legislation referred to:

Adoption Act 1952, ss. 10(1), (4), (5), 22, 25(6)

Courts of Judicature Act 1964, ss. 4, 33, 35, 67(1)

Adoption Act 1988 [UK], s. 10

For the appellants - Manjit Singh (Rozeka Md Kamdari); M/s A Zahari & Rakan-Rakan

For the respondents - Balwant Singh Sidhu; M/s Balwant Singh Sidhu & Co

[Appeal from High Court, Melaka; Originating Summons No: 24-30-1999]

Reported by Gan Peng Chiang

JUDGMENT

Arifin Zakaria JCA:

The Appeal

In this case there were two applications filed in the High Court namely, O.M. No. 25-13-1998 filed by the natural parents ("the appellants") for a writ of *habeas corpus,* and O.S. No. 24-30-1999 filed by the adoptive parents ("the respondents") asking for the legal adoption of the child named Joyce Kala Vandaiyar ("Joyce") pursuant to the Adoption Act 1952 ("the Act"). It was agreed at the outset that the adoption application be heard first and the application for the writ of *habeas corpus* to follow the outcome of the adoption application. The learned judge made an order in terms of the adoption application and hence dismissing the *habeas corpus* application. The appellants being dissatisfied with the said decision now appeal to this court.

Brief Facts

The facts leading to this application are briefly as follows. The child, Joyce, who is at the centre of the dispute, was born on 5 September 1991. She was placed in the care of her grandmother immediately upon discharge from hospital. Six months later when the grandmother left for India the appellants placed her in the care of the 1st and 2nd respondents. The 2nd appellant and the 2nd respondent are sisters. The 2nd appellant *vide* letter dated 9 April 1996

(exh. A3), acknowledged the fact that the respondents had been the guardian and foster parents of the child since May 1992. In the same letter she also acknowledged that she was in full agreement with any decision taken by the respondents regarding Joyce's education/schooling and overall well-being. However, in their affidavit in reply affirmed on 2 February 1999, the appellants categorically denied that they had *de facto* given Joyce for adoption by the respondents. They claimed that they merely intended that the respondents look after the said child during their matrimonial differences and that they never intended to surrender their parental rights to the respondents. In the paramount welfare and best interest of the said child and in their best interest as natural parents, they prayed that the application by the respondents be refused.

For the reasons stated in the grounds of judgment the learned judge allowed the respondents' application. At the hearing of this appeal the learned counsel for the respondents raised two preliminary objections. We were asked to decide on these preliminary objections before considering the merit of the appeal. We now deal with these preliminary objections.

The Preliminary Objections

Whether An Appeal Lies To This Court Where An Application For Adoption Was Allowed By The High Court

It is trite law that a right of appeal is a creature of statute. For authorities see, *Benson v. Northern Ireland Road Transport Board* [1942] AC 520, 575; *T.P.C v. A.B.U. & Anor* [1983] 1 CLJ 330; [1983] CLJ (Rep) 881, *Capital Insurance Bhd. v. Aishah bte. Abdul Manap* [2000] 4 CLJ 1; *Auto Dunia Sdn. Bhd. v. Wong Sai Fatt* [1995] 3 CLJ 485. In the present case the right of appeal is founded upon s. 22 of the Act which reads:

> 22. An appeal shall lie to the Federal Court or to the High Court **from any refusal** of the High Court or a Sessions Court, as the case may be, to make an interim order or an adoption order. (emphasis added.)

The learned counsel for the respondents contended that the said section merely provides that an appeal would lie against the decision of the court of first instance only where it had refused to make an interim order or an adoption order, and by necessary implication no appeal shall lie against the decision of the said court when an adoption order was made by the court as in the present case. On that premise he contended the appeal herein is not a competent appeal and should be dismissed in limine.

The contention of the learned counsel for the repondents found support in the decision of one of our eminent judges, Edgar Joseph Jr. J (as he then was) in *T.P.C. v. A.B.U. & Anor (supra)*. In that case the same issue came for consideration of the court. There the court held that as the impugned order was one approving an application for adoption no appeal lies. In his grounds of judgment His Lordship considered s. 10 of the Adoption Act 1988 in England together with ss. 22 and 25(6) of the Act in coming to his decision. The relevant part of the judgment reads:

> In England section 10 of the Adoption Act 1958 provides as follows:
>
> > Where, on an application made in England to a magistrates' court, the court makes or refuses to make an adoption order, an appeal shall lie to the High Court.
>
> In this country, sections 22 and 25(6) of the Act provide as follows:
>
> > 22. An appeal shall lie to the Federal Court or to the High Court from any refusal of the High Court or a Sessions Court, as the case may be, to make an interim order or an adoption order.
> >
> > 25(6). Where an adoption order is quased, or an appeal against an adoption order allowed, the Court which made the order shall give directions to the Registrar-General to cancel any marking of an entry in the Registers of Births and any entry in the Adopted Children Register which was effected in pursuance of the order.
>
> It is true that section 25(6) suggests that appeals do lie against orders approving an application for adoption. In my view, however, this subsection merely confers powers on the Court concerned to make consequential orders addressed to the Registrar-General of Births & Deaths whereas section 22 is a specific provision which gives the right of appeal and there being an apparent conflict between the two provisions, the latter overrides the former.
>
> I therefore hold that as the impugned order was one approving an application for adoption, no appeal lies. The appeal is therefore dismissed in limine.

Having said that the learned judge then went on to consider the merits of the matter before him by way of revision pursuant to the provisions of ss. 33 and 35 of the Courts of Judicature Act 1964 ("the CJA"). Needless to say that this court has no similar power under the CJA.

Mr. Manjit Singh, learned counsel for the appellant submitted that the case of *T.P.C. v. A.B.U. & Anor (supra)* was wrongly decided because the learned judge failed to consider s. 10 of the Act which clearly provides that an appeal lies from the decision of a learned judge. Section 10(1) of the Act confers

jurisdiction either on the High Court or at the option of the applicant any Sessions Court to make adoption orders. Section 10(4) & (5) then goes on to provide that:

> 10(4) The President of a Sessions Court may if he thinks fit submit any question of law, practice or procedure in connection with any application for the decision of a Judge of the High Court and if he does so he shall decide such question in conformity with such decision. (Added Ord. 35/53)
>
> 10(5) An appeal shall lie to the Federal Court from any decision of a Judge under this section.

Thus it would appear that the right of appeal in s. 10(5) is only confined to a decision made by the judge of the High Court on any question of law, practice or procedure submitted to him by a Sessions Court under s. 10(4) of the Act. We are fortified in our view by the use of the words "from any decision of a judge under this section". The words "this section" here clearly mean s. 10 of the Act and not any other section. The instant appeal could not come under s. 10(5) of the Act.

The learned counsel further argued that the interpretation given by the court in *T.P.C. v. A.B.U. & Anor (supra)* if followed by this court would work injustice on the natural parents. He also contended that the finding of the learned judge in that case goes against the Federal Court's decision in *Re Thow Seng Yeap; Thow Chow Goon & Anor v. Khor Kar Chooi & Anor* [1989] 3 MLJ 482. In that case the natural parents appealed to the Federal Court against the decision of the High Court in allowing an adoption application. There the Federal Court reversed the order of the learned High Court Judge and ordered that the infant be returned to the natural parents. Based on that authority he submitted that appeals lie to this court from the decision of the High Court. With respect, we find that in *Re Thow Seng Yeap (supra)* the issue raised herein pertaining to the right of appeal under s. 22 was not at all canvassed before the Federal Court. Therefore, to that extent this court is not bound by that decision. In the circumstances, therefore, it falls upon us to give a judicial interpretation on s. 22. Having considered the matter we agree with learned counsel for the respondents that s. 22 on its plain reading only confers the right of appeal in cases where the adoption application was refused by the High Court and not otherwise. In the present case since the application for adoption was allowed by the High Court we hold that no appeal lies against the said decision. However, we agree with appellants' counsel that there seems to be a lacuna in the Act as it presently stands, but it is not for this court to remedy the same. It is a matter falling strictly within the purview of the legislature.

Our attention was also drawn to the provision of s. 67(1) of the CJA which reads:

> 67(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

This section confers jurisdiction on the Court of Appeal to hear appeals from any judgment or order of any High Court in any civil cause or matter. However, this broad power is subject to any written law regarding the terms and conditions upon which such appeals shall be brought. The applicable law in the context of the present appeal is the Act which by s. 22 curtails the right of appeal to cases where the application for adoption had been refused by the court. For the above reasons we are of the view that s. 67(1) of the CJA is also of no avail to the appellants.

Whether An Appeal Lies To This Court Or To The Federal Court

The second issue is whether appeals lie to this court or to the Federal Court. Section 22 provides that an appeal shall lie to the Federal Court or to the High Court from any refusal to make an adoption order by the High Court or the Sessions Court as the case may be. Learned counsel for the appellants submitted that there is a conflict between s. 22 of the Act and s. 67 of CJA and since the Act had been in force prior to the CJA, therefore, by virtue of s. 4 of the CJA the provisions of the CJA will prevail. Hence, the appeal in the present case, if at all there is a right of appeal, should properly be to the Court of Appeal and not to the Federal Court.

To put the issue in perspective, it is not disputed that when the CJA came into force in 1964 the Act was already in force. At that point of time there is no inconsistency or conflict between the CJA and the Act. The inconsistency or conflict only arose after the amendment to the CJA under Act A886 which came into force on 24 June 1994, which provides that the Court of Appeal shall have jurisdiction to hear appeal from any judgment or order of the High Court. Abdul Malek Ahmad FCJ in *United Malacca Bhd. v. Pentadbir Tanah Daerah Alor Gajah & Other Applications* [2002] 4 CLJ 177 had considered the effect of s. 4 of CJA and he said at p. 187:

Section 4 of the CJA states:

> 4. Provision to prevent conflict of laws
>
> In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.

The crucial words of that section appear to be 'in force at the commencement of this Act' meaning that the inconsistency or conflict with any other written law should be at the point of time when the CJA was enacted and not subsequently.

So for s. 4 of the CJA to apply the inconsistency or conflict must exist as at the date the CJA came into force ie, in 1964 and not after that date. In the present case the apparent inconsistency or conflict only arose when Act A886 came into force on 24 June 1994. Therefore, s. 4 of the CJA has no application to the present case. For these reasons we hold that, if at all an appeal should lie from the decision of the High Court, which we hold otherwise, then the appeal would lie to the Federal Court as provided in s. 22 of the Act and not to this court.

For the above reasons we agree with the preliminary objections raised by the learned counsel for the respondents and hold that there is no competent appeal before us and order that the appeal be struck out with costs. Deposit to respondents towards account of taxed costs.